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MITSUI O.S.K. LINES, LTD.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MITSUI O.S.K. LINES, LTD., Plaintiff, v. CB FREIGHT INT'L, INC., SKY-WORLD INT'L EXPRESS, INC., UNIVERSAL CONCORD CO. and DOES ONE TO TWENTY, Defendants.	Case No. 3:15-cv-05289 **COMPLAINT FOR DAMAGES AND ACCOUNTING**

Plaintiff MITSUI O.S.K. LINES, LTD. ("MOL") alleges as follows:

JURISDICTION

1. This is a suit for unpaid freight charges pursuant to an ocean bill of lading, tariff and/or service contract and comprises an admiralty and maritime claim pursuant to Rule 9(h) of the Federal Rules of Civil Procedure and 28 U.S.C. § 1333(1). In the alternative, it presents a federal question under 28 U.S.C. § 1331 in that it arises under the Shipping Act of 1984, as amended, 46 U.S.C. §§ 40101 *et seq*.

INTRADISTRICT ASSIGNMENT

2. Applicable contract provisions include a clause by which Defendants submit to the jurisdiction and venue of this Court, which District includes the Port of Oakland where MOL

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transports cargo by ocean vessel. This action is therefore properly assigned to the San Francisco or Oakland Division of this Court.

THE PARTIES

3. Plaintiff MOL is now and at all times material herein was a corporation duly organized and existing under the laws of Japan. Plaintiff was, and still is, an ocean carrier and common carrier of goods for hire between United States ports and foreign ports, and properly published tariffs and/or filed service contracts for the transportation of goods of the type and between the ports or areas as hereinafter alleged.

4. Defendant CB INT'L FREIGHT, INC. ("CB") is, on information and belief, a corporation organized under the laws of the Peoples' Republic of China, and is an FMC-registered Non Vessel Operating Common Carrier ("NVOCC").

5. Defendant SKY-WORLD INT'L EXPRESS, INC. ("SKY WORLD") is, on information and belief, a corporation organized under the laws a state or territory of the United States, and is an FMC-registered NVOCC.

6. UNIVERSAL CONCORD CO. ("UCC") is, on information and belief, a corporation organized under the laws of a state or territory of the United States, and is an FMC-registered NVOCC.

7. The true names and capacities of defendants sued as Does are unknown to plaintiff. Each of the defendants was, at all times relevant, the agent, employee, joint venturer and/or co-conspirator of the others and acting in the course and scope of the agency relationship, employment, joint venture and/or co-conspiracy in performing the acts alleged, and each defendant has ratified and approved the acts of its agent(s).

GENERAL ALLEGATIONS

8. Plaintiff's Bills of Lading, tariff (duly published at www.MOLpower.com) and service contract terms and conditions provide, inter alia:

1. DEFINITIONS

[…] "Merchant" includes the shipper, Holder of this Bill of Lading, Consignee, receiver of the goods, any person owning or entitled to possession of the Goods or this Bill of Lading, and anyone acting on behalf of such person.

> [...]
>
> 10. MERCHANT’S RESPONSIBILITY
>
> (1) All of the Persons coming within the definition of Merchant in Clause 1 shall be jointly and severally liable to the Carrier for the due fulfillment of all obligations of the Merchant in this Bill of Lading.
>
> (2) The Merchant warrants to the Carrier that the particulars relating to the Goods as set out overleaf have been checked by the Merchant on receipt of this Bill of Lading and that such particulars and any other particulars furnished by or on behalf of the Shipper are accurate and correct. […]
>
> 11. FREIGHT
>
> (1) Freight shall be deemed fully earned on receipt of the Goods by the Carrier, whether the Goods are lost or not, and shall be paid and non-returnable in any event. […]
>
> (3) Freight has been calculated on the basis of particulars furnished by or on behalf of the Merchant. If the particulars furnished by or on behalf of the Merchant are incorrect, it is agreed that a sum equal to double the correct Freight less the Freight charged shall be payable as liquidated damages to the Carrier, provided that the Carrier’s Tariff does not stipulate otherwise. […]
>
> (5) The Merchant shall be liable to the Carrier for payment of all Freight and/or expenses including, but not limited to, court costs, legal fee and expenses incurred in collecting monies due to the Carrier. Payment of the Freight to a freight forwarder, broker or anyone other than the Carrier or its authorized agent shall not be deemed payment to the Carrier and shall be made at the Merchant’s sole risk.

MOL’s tariff further states as follows:

> If a misdescription or misdeclaration is found as a result of this inquiry, the cargo interests shall be liable to pay (a) the additional applicable tariff or contract freight and charges due on such cargo as rated correctly, which shall be payable by any party liable for payment of the freight and charges; and (b) an additional amount equal to the full amount of all tariff or contract freight and charges due on the cargo as rated correctly, which shall be paid by the party responsible for the misdescription or misdeclaration. This rerating charge shall be applied separately for each misdescription or misdeclaration on a shipment.

9. At all times relevant, MOL and CB were parties to a Service Contracts, including those numbered CN0000ERT and CN00005Q8, which incorporated by reference the terms and conditions of MOL’s bill of lading and tariff.

10. At times relevant, Defendant CB was a “Shipper” and/or “Merchants” (as those terms are used in the MOL B/L, tariff and service contracts) with respect to various shipments for which proper bills of lading and freight bills were issued by or on behalf of Plaintiff. The said

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shipments were tendered for transportation between United States and foreign ports on board ocean vessels for which freight charges lawfully were incurred in favor of MOL pursuant to the aforesaid tariff and contracts of carriage.

11. At times relevant, Defendants Sky-World and UCC were “Consignees,” “Notify Parties” and/or “Merchants” (as those terms are used in the MOL B/L, tariff and service contracts) with respect to various shipments for which proper bills of lading and freight bills were issued by or on behalf of Plaintiff. With respect to the shipments at issue in this case consigned to them, at all times relevant these Defendants accepted delivery of the cargo without making objection or taking exception.

12. Under the Shipping Act, 46 U.S.C. §§ 40101 et seq., as well as the applicable contracts of carriage, Defendants are obligated to pay the entire amounts of freight due under the applicable tariff and/or service contract for each shipment, as well as additional damages if the cargo is misdecribed/misdeclared to MOL. It has been determined that, during times relevant, Defendants repeatedly obtained transportation of property at less than the rates or charges established by MOL in its published tariff and in the service contracts on file with the United States Federal Maritime Commission.

13. At times relevant, CB misdescribed or misdeclared commodities to MOL on at least 135 shipments. As a result of these misdeclarations, MOL charged and collected less than was actually due under the relevant service contract and tariff. In addition, each misdeclaration gives rise to “liquidated damages” and a “rerating charge” under the relevant contracts of carriage.

14. Where a remaining defendant was the consignee and/or notify party, it accepted the corresponding shipments and took delivery of the cargo, with full knowledge that the information that had been provided to MOL was inaccurate.

15. MOL has also incurred additional expenses and costs relating to these shipments, and will continue to do so, including auditing expenses and attorney fees and costs incurred in this action in collection of these costs, all of which are according to proof, but in any event in excess of the jurisdictional minimums, if any, of this Court.

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FIRST CLAIM FOR RELIEF

(Breach of Maritime Contract)

16. MOL incorporates by reference paragraphs 1 to 15.

17. Pursuant to the Subject B/L and otherwise, Defendants agreed and otherwise became bound to pay MOL for ocean freight and related charges in amounts provided by service contract and/or tariff. However, Defendants have repeatedly obtained transportation of property at less than the rates or charges established by MOL in its tariff or service contract and have failed to pay all damages to which it is obligated under the relevant tariff and service contract.

18. Defendants owe, *in toto*, US$ 1,056,854 plus CNY 260,820 in outstanding freight charges. Of those charges, Sky World owes at least $139,590 and CNY 66,190, and UCC owes at least $879,988 and CNY 180,780. Plaintiff has demanded payment of the outstanding ocean freight charges and/or hereby demands payment thereof.

19. Plaintiff has performed each and all of its obligations, actual and implied, arising pursuant to its contracts with Defendants and imposed by law.

SECOND CLAIM FOR RELIEF

(Accounting)

20. MOL incorporates by reference paragraphs 1 to 19.

21. MOL has audited some, but not all, shipments tendered by Defendants during the relevant time period. Given that the audit to date has revealed repeated instances of incorrect charges, on information and belief, further auditing is necessary in order to determine additional amounts for which Defendants are liable.

22. On information and belief, Defendants, and each of them, are in possession of information including which will accurately identify correct freight charges for such additional shipments.

23. Any additional balance of unpaid and/or underpaid freight due MOL, therefore, can only be ascertained by accounting.

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THIRD CLAIM FOR RELIEF

(Intentional Misrepresentation)

24. MOL incorporates by reference paragraphs 1 to 23.

25. Defendants, and each of them, falsely described the contents of shipments and/or falsely submitted shipments for carriage under "named account" rates, and/or fraudulently concealed the true contents and facts thereof.

26. The foregoing false representations were made over the course of years by various agents, employees, joint venturers, co-loaders and/or co-conspirators of defendants. In reliance thereon, MOL repeatedly charged amounts less than were in fact due for the shipments in question.

27. The foregoing conduct was intentional and willful, and despicable.

28. MOL has been damaged thereby, according to proof.

FOURTH CLAIM FOR RELIEF - ALTERNATIVE

(Negligent Misrepresentation)

29. MOL incorporates by reference paragraphs 1 to 28.

30. Defendants, and each of them, falsely described the contents of shipments and/or falsely submitted shipments for carriage under "named account" rates, and/or concealed the true contents and facts thereof despite legal obligation to disclose same.

31. The foregoing false representations were made over the course of years by various agents, employees, joint venturers, co-loaders and/or co-conspirators of defendants. In reliance thereon, MOL repeatedly charged amounts less than were in fact due for the shipments in question.

32. The foregoing conduct was negligent.

33. MOL has been damaged thereby, according to proof.

PRAYER FOR RELIEF

WHEREFORE, plaintiff MOL prays judgment as follows:

1. For at least US$ 1,056,854 plus CNY 260,820 and interest thereon at the legal rate;

2. For an accounting of additional amounts of freight due above and beyond the aforestated amount;

3. For all sums and amounts found to be due and owning from the defendants to plaintiffs as a result of said accounting along with interest thereon at the legal rate.

4. For all costs of suit, attorney fees and other expenses herein incurred;

5. For such and other relief as the Court may deem proper.

Dated: November 18, 2015 CLYDE & CO US LLP

By: /s/ *Conte C. Cicala*
Conte C. Cicala
Attorneys for Plaintiff
MITSUI O.S.K. LINES, LTD.

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JS 44 (Rev. 12/12) cand rev (1/15/13)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS
MITSUI O.S.K. LINES, LTD.

(b) County of Residence of First Listed Plaintiff N/A
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
Conte C. Cicala
Clyde & Co US LLP
101 Second Street, 24th Floor
San Francisco, CA 94105 Tel: 415.365.9800

DEFENDANTS CB Freight Int'l, Inc., Sky-World Int'l Express, Inc. Universal Concord Co..

County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- [ ] 1 U.S. Government Plaintiff
- [X] 3 Federal Question *(U.S. Government Not a Party)*
- [ ] 2 U.S. Government Defendant
- [ ] 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*

(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	[ ] 1	[ ] 1	Incorporated *or* Principal Place of Business In This State	[ ] 4	[ ] 4
Citizen of Another State	[ ] 2	[ ] 2	Incorporated *and* Principal Place of Business In Another State	[ ] 5	[ ] 5
Citizen or Subject of a Foreign Country	[ ] 3	[ ] 3	Foreign Nation	[ ] 6	[ ] 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

CONTRACT
- [ ] 110 Insurance
- [X] 120 Marine
- [ ] 130 Miller Act
- [ ] 140 Negotiable Instrument
- [ ] 150 Recovery of Overpayment & Enforcement of Judgment
- [ ] 151 Medicare Act
- [ ] 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- [ ] 153 Recovery of Overpayment of Veteran's Benefits
- [ ] 160 Stockholders' Suits
- [ ] 190 Other Contract
- [ ] 195 Contract Product Liability
- [ ] 196 Franchise

TORTS

PERSONAL INJURY
- [ ] 310 Airplane
- [ ] 315 Airplane Product Liability
- [ ] 320 Assault, Libel & Slander
- [ ] 330 Federal Employers' Liability
- [ ] 340 Marine
- [ ] 345 Marine Product Liability
- [ ] 350 Motor Vehicle
- [ ] 355 Motor Vehicle Product Liability
- [ ] 360 Other Personal Injury
- [ ] 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- [ ] 365 Personal Injury - Product Liability
- [ ] 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- [ ] 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- [ ] 370 Other Fraud
- [ ] 371 Truth in Lending
- [ ] 380 Other Personal Property Damage
- [ ] 385 Property Damage Product Liability

FORFEITURE/PENALTY
- [ ] 625 Drug Related Seizure of Property 21 USC 881
- [ ] 690 Other

LABOR
- [ ] 710 Fair Labor Standards Act
- [ ] 720 Labor/Management Relations
- [ ] 740 Railway Labor Act
- [ ] 751 Family and Medical Leave Act
- [ ] 790 Other Labor Litigation
- [ ] 791 Employee Retirement Income Security Act

IMMIGRATION
- [ ] 462 Naturalization Application
- [ ] 465 Other Immigration Actions

BANKRUPTCY
- [ ] 422 Appeal 28 USC 158
- [ ] 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- [ ] 820 Copyrights
- [ ] 830 Patent
- [ ] 840 Trademark

SOCIAL SECURITY
- [ ] 861 HIA (1395ff)
- [ ] 862 Black Lung (923)
- [ ] 863 DIWC/DIWW (405(g))
- [ ] 864 SSID Title XVI
- [ ] 865 RSI (405(g))

FEDERAL TAX SUITS
- [ ] 870 Taxes (U.S. Plaintiff or Defendant)
- [ ] 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- [ ] 375 False Claims Act
- [ ] 400 State Reapportionment
- [ ] 410 Antitrust
- [ ] 430 Banks and Banking
- [ ] 450 Commerce
- [ ] 460 Deportation
- [ ] 470 Racketeer Influenced and Corrupt Organizations
- [ ] 480 Consumer Credit
- [ ] 490 Cable/Sat TV
- [ ] 850 Securities/Commodities/ Exchange
- [ ] 890 Other Statutory Actions
- [ ] 891 Agricultural Acts
- [ ] 893 Environmental Matters
- [ ] 895 Freedom of Information Act
- [ ] 896 Arbitration
- [ ] 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- [ ] 950 Constitutionality of State Statutes

REAL PROPERTY
- [ ] 210 Land Condemnation
- [ ] 220 Foreclosure
- [ ] 230 Rent Lease & Ejectment
- [ ] 240 Torts to Land
- [ ] 245 Tort Product Liability
- [ ] 290 All Other Real Property

CIVIL RIGHTS
- [ ] 440 Other Civil Rights
- [ ] 441 Voting
- [ ] 442 Employment
- [ ] 443 Housing/ Accommodations
- [ ] 445 Amer. w/Disabilities - Employment
- [ ] 446 Amer. w/Disabilities - Other
- [ ] 448 Education

PRISONER PETITIONS

Habeas Corpus:
- [ ] 463 Alien Detainee
- [ ] 510 Motions to Vacate Sentence
- [ ] 530 General
- [ ] 535 Death Penalty

Other:
- [ ] 540 Mandamus & Other
- [ ] 550 Civil Rights
- [ ] 555 Prison Condition
- [ ] 560 Civil Detainee - Conditions of Confinement

V. ORIGIN *(Place an "X" in One Box Only)*

- [X] 1 Original Proceeding
- [ ] 2 Removed from State Court
- [ ] 3 Remanded from Appellate Court
- [ ] 4 Reinstated or Reopened
- [ ] 5 Transferred from Another District *(specify)*
- [ ] 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing **(*Do not cite jurisdictional statutes unless diversity*)**:
46 U.S.C §§ 40101 *et. sec.*

Brief description of cause:
Breach of contract

VII. REQUESTED IN COMPLAINT:

[ ] CHECK IF THIS IS A **CLASS ACTION** UNDER RULE 23, F.R.Cv.P.

DEMAND $1 M, plus

CHECK YES only if demanded in complaint:
JURY DEMAND: [ ] Yes [X] No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE November 18, 2015 SIGNATURE OF ATTORNEY OF RECORD /s/ *Conte C. Cicala*

IX. DIVISIONAL ASSIGNMENT (Civil L.R. 3-2)
(Place an "X" in One Box Only) (X) SAN FRANCISCO/OAKLAND ( ) SAN JOSE ( ) EUREKA

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I.(a) **Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) **County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) **Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. **Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)

III. **Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. **Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.

V. **Origin.** Place an "X" in one of the six boxes.
Original Proceedings. (1) Cases which originate in the United States district courts.
Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

VI. **Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service

VII. **Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. **Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

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